88-889

Supreme Court, U.S.
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

MILLERS NATIONAL INSURANCE COMPANY;
JOHN CAULFIELD, dba CAULFIELD
TRUCKING; DONALD PRESTON THURMAN

Petitioners,

v.

AXEL'S EXPRESS, INC.

FIREMAN'S FUND INSURANCE COMPANY,

Respondents

APPENDIX TO PETITION
WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MILLERS NATIONAL INSURANCE COMPANY, et al., Plaintiffs, vs. AXEL'S EXPRESS, INC., et al., Defendants.	NO. CV 86-6592 AWT ORDER OF DISMISSAL
AND RELATED COUNTERCLAIM.	

This is an action to obtain a declaration of rights and liabilities as between insurers. Jurisdiction is predicated under 28 U.S.C. §§1331 & 1337. There is no diversity of citizenship.

Because, at the pretrial conference, the Court was not satisfied that it had subject matter jurisdiction, further

briefing was ordered on the issue (twice) and the matter was argued. The Court has concluded that it has no jurisdiction.

As between lessor and lessee (the truckers), the Court may have "arising under" jurisdiction under 49 U.S.C. §11107(a)(4) and the regulations promulgated thereunder, 49 C.F.R. Part 1057. See Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983). However, this would not give the Court jurisdiction of any dispute between the insurers, because they would be pendent parties. See, e.g., Carpenters So. Cal. Admin. Corp v. D & L Camp Constr. Co., 738 F.2d 999 (9th Cir. 1984).

Moreover, because the dispute with the third-party claimant, James Gagner, has been settled, the truckers no longer have any interest in this matter -- with respect to Caulfield, Thurman and Axel's,

the action is now moot. All that remains is purely a dispute between insurance carriers as to who is primarily liable for coverage.

That dispute does not arise under federal law. See Transamerica Freight Lines, Inc. v. Brada Miller Freight Sys., Inc., 423 U.S. 28, 39-40 (1975); Grinnell Mut. reins. Co. v. Empire Fire & Marine Ins. Co., 722 F.2d 1400, 1404 (8th Cir. 1983), cert. denied, 466 U.S. 951 (1984); Carolina Cas. Ins. Co. v. Underwriters Inc. Co., 569 F.2d 304, 313 (5th Cir. 1978); contra, Argonaut Ins. Co. v. National Indem. Co., 435 F.2d 718 (10th Cir. 1971) (predating Brada Miller). As these cases demonstrate, not every case which may involve the interpretation of some federal statute or regulation "arises under" federal law. See generally Franchise Tax Bd. v.

Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

IT IS ORDERED that this action is DISMISSED without prejudice for lack of subject matter jurisdiction.

Dated: October 7, 1987

A. WALLACE TASHIMA
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILLERS NATIONAL INSURANCE COMPANY; JOHN CAULFIELD, dba Caulfield Trucking; DONALD PRESTON THURMAN,
Plaintiffs-Counter-Defendants-Appellants,

and

INTERSTATE TRUCK UNDERWRITERS, INC.,
Plaintiff-Counter-Defendant,

v.

AXEL'S EXPRESS, INC.,
Defendant-Appellee,

FIREMAN'S FUND INSURANCE COMPANY,
Defendant-Counter-Claimant-Appellee.

No. 87-6606
D.C. No. CV-86-6592-AWT
OPINION

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
May 4, 1988—Pasadena, California

Filed July 1, 1988

Before: Procter Hug, Jr., Alex Kozinski and David R. Thompson, Circuit Judges.

Opinion by Judge Hug

SUMMARY

Jurisdiction/Insurance/Motor Carriers

The court affirmed the district court's judgment dismissing the action for a lack of jurisdiction. The court held that the district court did not have federal-question jurisdiction.

Appellant Donald Thurman was involved in an accident while driving a truck owned by appellant Caulfield Trucking and leased to appellee Axel's Express. After the personal injury action was settled, appellant Millers National Insurance Co., Caulfield's and Thurman's insurer, filed a complaint alleging that Axel's was exclusively liable for the damages. The district court dismissed the action, finding there was no federal subject matter jurisdiction.

[1] Under federal law, Axel's was required to file an insurance policy or security before operating the truck in interstate commerce. [2] Though resolution of this action may involve a determination of federal law, that alone is not sufficient to invoke federal-question jurisdiction. [3] There is nothing in the regulations or the federal statute that deals with the question of allocating liability between the insurers of an owner and a carrier. Congress did not intend to provide a federal private right of action to insurers of carriers for indemnification.

COUNSEL

Charles M. Farano and Jeffrey L. Farano, Farano and Kieviet, Anaheim, California, for the appellants.

Kurt A. Moll, Rigg and Dean, Santa Ana, California, for the appellees.

OPINION

HUG, Circuit Judge:

This is an appeal from a dismissal for lack of jurisdiction. The sole issue is whether a federal district court has federal-question jurisdiction over a dispute between two insurance companies for coverage of an accident involving an interstate motor carrier regulated under federal law. We affirm.

FACTS

On June 16, 1985, Donald Thurman was driving a truck owned by Caulfield Trucking ("Caulfield") and leased to Axel's Express, Inc. ("Axel's"). Axel's was a common carrier authorized by the Interstate Commerce Commission ("ICC") to engage in interstate commerce. While he was driving, Thurman fell asleep, and the truck hit a parked vehicle, causing serious injuries to the occupant, James Gagner. On June 3, 1986, Gagner filed a complaint for damages in state court, naming Caulfield, Thurman, and Axel's as defendants.

At the time of the accident, Axel's was insured by Fireman's Fund Insurance Co. ("Fireman's"); and Caulfield and Thurman were both insured by Millers National Insurance Co. ("Millers"). The lease under which Axel's was operating stated, "The Contractor [Caulfield] shall hold Carrier [Axel's] harmless from any loss or damage incurred by Carrier as a result of the negligent operation, maintenance, or best use of the vehicles . . . . The Contractor shall maintain continuous insurance coverage sufficient to hold Carrier harmless."

A settlement was reached in the *Gagner* action. Fireman's contributed $450,000 towards settlement on behalf of its insured, Axel's. Millers contributed $200,000 on behalf of its insureds, Caulfield and Thurman. The settlement was premised on the reservation of each party's rights and obligations

regarding coverage and liability, to be determined at a later time.

On October 10, 1986, Millers filed a complaint in federal district court against Axel's and Fireman's for damages and a judicial declaration that Axel's was exclusively liable for the damages claimed by Gagner and that, as Axel's insurer, Fireman's was responsible for primary coverage of the Gagner claim. Fireman's counterclaimed,[1] requesting a judicial declaration that Caulfield and Thurman were exclusively liable for the accident and that Millers was responsible for primary coverage of the loss and Fireman's responsible only for excess coverage.

The district court dismissed the action for lack of subject matter jurisdiction. There was no diversity of citizenship between the parties, and the court did not find the existence of a federal question sufficient to invoke jurisdiction under 28 U.S.C. § 1331 (1982).[2] This appeal was taken by Millers. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982). The sole issue on appeal is whether the district court had jurisdiction over the dispute. The existence of subject matter jurisdiction presents a question of law reviewable *de novo*. *Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986).

DISCUSSION

Millers argues that jurisdiction exists because the determi-

[1]Though Fireman's contested federal jurisdiction over the action brought by Millers, it counterclaimed in the event that the court found jurisdiction. In its counterclaim, Fireman's stated that it did not concede the jurisdictional issue.

[2]That section states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

nation of insurance coverage rests on which party is primarily liable for the accident. This underlying liability, Millers contends, is governed by federal law. While Millers acknowledges existence of the indemnity clause in the lease, whereby Millers' insured agreed to hold Axel's harmless for liability, Millers disputes the validity of this indemnity clause based on federal regulations. The argument appears to be that federal law governs the question of liability for the accident, and any indemnification agreement which would allocate liability contrary to federal law is not valid.

[1] The truck involved in this case was a leased vehicle engaged in interstate commerce, regulated under 49 U.S.C. § 10101 *et seq.* Under 49 U.S.C. § 10927, a motor carrier such as Axel's may not operate in interstate commerce unless it files an insurance policy or other type of security in compliance with applicable regulations. The security must be sufficient to pay "for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles" subject to regulation. 49 U.S.C.A. § 10927(a)(1) (1988). The purpose of this law is "to assure to members of the public . . . that a certificated carrier has independent financial responsibility . . . to pay for losses created by its carrier operations." *Carolina Casualty Ins. Co. v. Underwriters Ins. Co.*, 569 F.2d 304, 312 (5th Cir. 1978) (discussing section 215 of the Interstate Commerce Act, 49 U.S.C. § 315, which 49 U.S.C.A. § 10927(a)(1) supersedes).[3] Some courts have held, based on the federal statute and regulations, that the carrier is liable for injuries caused by the leased vehicle. *See Grinnell Mutual Reinsurance Co. v. Empire Fire & Marine Ins. Co.*, 722 F.2d 1400, 1404 (8th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984)

[3]To implement this statutory requirement, the ICC requires the motor carrier to file proof of adequate insurance. The carrier must attach form BMC 90 to the carrier's insurance policy; the form acts as an endorsement, stating that the carrier's policy provides the required coverage. At the time of the accident in question, Axel's was properly certified by the ICC.

("[T]he ICC regulations . . . make a carrier liable to the public for negligent acts of the vehicle's driver . . . ."). *See also Rodriguez v. Ager*, 705 F.2d 1229, 1236 (10th Cir. 1983). Millers contends that, since Axel's arguably would be liable for the accident under federal law,[4] its insurer, Fireman's, is responsible for primary coverage. According to Millers, this case "arises under" federal law because the determination of insurance coverage follows directly from the underlying determination of liability, which itself is governed by federal law.

[2] In essence, Millers' claim for indemnity is a state law claim. Though its resolution may involve a determination of federal law, that alone is not sufficient to invoke federal-question jurisdiction. We believe this case falls squarely within the Supreme Court's holding in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229 (1986).

In *Merrell Dow*, the plaintiffs brought an action in state court against a drug manufacturer, alleging that the drug caused multiple birth defects in a child. In one of the six counts, plaintiffs alleged that the drug was misbranded in violation of the Federal Food, Drug, and Cosmetic Act, ("FDCA") and that such violation constituted a rebuttable presumption of negligence in the state law action. The case was removed to district court.

Denying the plaintiffs' motion to remand, the district court found that federal-question jurisdiction was invoked by virtue of plaintiffs' reliance on the defendant's violation of federal law. The Supreme Court reversed, holding that the case did not arise under federal law. It began its analysis by noting that "the vast majority of cases brought under the general

[4]Millers points out that although Gagner's claim has been settled, the issue of liability between Axel's and Caulfield has not been resolved. The settlement was contingent upon reserving the parties' rights and obligations regarding liability and coverage issues.

federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Id.* at 3233. The court pointed to the "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Id.* at 3235. The Court noted that the federal law in that case (the FDCA) did not create any of the causes of action asserted by the plaintiffs, but rather, the case involved "the presence of a federal issue in a state-created cause of action." *Id.* at 3233. It concluded, "[A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.' 28 U.S.C. § 1331." *Id.* at 3237.

We had occasion to interpret *Merrell Dow* in *Utley v. Varian Associates, Inc.*, 811 F.2d 1279 (9th Cir.), *cert. denied*, 108 S. Ct. 89 (1987). There we explained, "Under *Merrell Dow*, if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question" sufficient to confer federal-question jurisdiction. *Utley*, 811 F.2d at 1283.

We found that federal-question jurisdiction did not exist in *Utley*. In that case, Utley brought a state law employment discrimination action against his employer. The case was removed to federal court. In one claim, Utley alleged that his employer dismissed him because of his race, in violation of the employer's affirmative action duties as a federal contractor under a federal Executive Order. He contended that such violation amounted to an unlawful employment practice under section 12940 of the California Government Code, which prohibits employers from discharging employees on the basis of race. Applying the *Merrell Dow* analysis, we examined whether the federal Executive Order upon which Utley's state claim was predicated provided a private right of action. We stated, "Only if the executive order provides Utley

with a private right of action against [his employer] in federal court might his complaint raise a 'substantial' federal question permitting . . . jurisdiction." *Id.* at 1284. We found that no such private right of action existed and, accordingly, held that the state claims did not raise a substantial question of federal law sufficient to confer federal jurisdiction under *Merrell Dow*. *Id.* at 1286.

[3] We approach this case under the same analysis. The proper inquiry is whether the federal statute involved in Millers' state claim provides a private right of action. Millers' claim is predicated upon federal law governing interstate carriers. We have previously noted that "Congress and the ICC, through authorizing statutes and regulations, intended to impose financial responsibility requirements upon authorized carriers to protect the public." *Planet Ins. Co. v. Transport Indemnity Co.*, 823 F.2d 285, 286-87 (9th Cir. 1987). But though the regulations require the carriers to hold insurance to assure financial responsibility toward members of the public, there is nothing in the regulations or the statute that deals with the question of allocating liability between the insurers of an owner and a carrier. *See Grinnell*, 722 F.2d at 1404. We are convinced that Congress, in enacting the statute, did not intend to provide a federal private right of action to insurers of carriers for indemnification against insurers of equipment owners. Because Millers possesses no private right of action under federal law, the fact that federal law might be an element in its state law claim is not sufficient to present a federal question supporting jurisdiction under 28 U.S.C. § 1331.[5]

[5]We also reject Millers' argument that jurisdiction is conferred by 28 U.S.C. § 1352 (1982), which provides: "The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States . . . ." Millers argues that the insurance required by 49 U.S.C. § 10927 and 49 C.F.R. § 1043 is a type of security which falls under 28 U.S.C. § 1352. Insurance, however, is not normally thought of as a "bond" as that term is commonly used. Moreover, even if insurance could be thought of as a "bond" as the term is used in section 1352, this is not an "action on a bond." Rather, it is an action for indemnification brought by one insurer against another. This action follows the underlying state court action filed by Gagner. That action resembles, far more than this one does, an "action on a bond."

The district court's judgment is **AFFIRMED.**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILLERS NATIONAL INSURANCE COMPANY; JOHN CAULFIELD, dba, Caulfield Trucking; DONALD PRESTON THURMAN,	)	No. 87-6606
	)	D.C. No. CV-86-6592-AWT
Plaintiffs-Counter-Defendants-Appellants,	)	ORDER
and	)	FILED JULY 28, 1988
INTERSTATE TRUCK UNDERWRITERS, INC.	)	
Plaintiff-Counter-Defendant,	)	
vs.	)	
AXEL'S EXPRESS, INC.	)	
Defendant-Appellee,	)	
FIREMAN'S FUND INSURANCE COMPANY,	)	
Defendant-Counter-Claimant-Appellee.	)	

Appeal from the United States
District Court for the Central District
of California

Before: HUG, KOZINSKI, and THOMPSON, Circuit Judges.

The panel, as constituted in the above-entitled case, has voted to deny the petition for rehearing.

The petition for rehearing is denied.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MILLERS NATIONAL INSURANCE COMPANY, et al., Plaintiffs, vs. AXEL'S EXPRESS, INC., et al., Defendants.	NO. CV 86-6592 AWT FURTHER ORDER TO SHOW CAUSE RE JURISDICTION
AND RELATED COUNTERCLAIM.	

Based upon plaintiffs' memorandum, filed August 19, 1987 (to which defendants have not responded), the Court is satisfied that it has subject matter jurisdiction, but only with respect to limited aspects of the controversy.

The dispute as between plaintiffs Caulfield and his driver Thurman and

defendant Axel's Express appears to "arise under" 49 U.S.C. §11107(a)(4) and the regulations promulgated thereunder, 49 C.F.R. Part 1057. See Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983).

However, the rights and obligations of the various insurance carriers--plaintiffs Miller National Insurance Company and Interstate Truck Underwriters, Inc., and defendant Fireman's Fund Insurance Companies--appear to be governed by the terms of the respective policies. Any liability of any insurer is derivative only, based on the liability of its insured and the coverage afforded. It does not appear that insurance carriers are governed by Title 49 of the U.S. Code or the C.F.R. In fact, under the McCarran-Ferguson Act, 15 U.S.C. §1011 et seq., regulation of the business of insurance is left

expressly to the States.

There is no complete diversity of citizenship here so as to give this Court subject matter jurisdiction under 28 U.S.C. §1332. Therefore, the controversy with respect to coverage is a pendent claim -- pendent to the claim between the regulated truckers. The insurance carriers are pendent parties. This circuit does not recognize pendent party jurisdiction and that rule applies to pendent party insurers. Carpenters So. Cal. Admin. Corp. v. D & L Camp Constr. Co., 738 F.2d 999 (9th Cir. 1984) (doctrine applied to pendent party claim against surety).

The Court believes in these circumstances that, although it can proceed to adjudicate the dispute between the truckers, all insurance company parties must be dismissed.

IT IS ORDERED:

1. The parties shall show cause in writing by September 25, 1987, why all insurance company parties should not be dismissed without prejudice for lack of subject matter jurisdiction.

2. This order to show cause is set for hearing on October 5, 1987, at 10:00 a.m.

3. Should a partial dismissal be ordered, the parties should be prepared to address the issue of whether they desire the remainder of the controversy (as between the truckers) to proceed in this forum.

Dated: September 14, 1987

A. WALLACE TASHIMA
United States District Judge

49 USCS §10101. Transportation policy

(a) To ensure the development, coordination, and preservation of a Transportation system that meets the transportation needs of the United states including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes-

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions

among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

(b) This subtitle shall be administered and enforced to carry our the policy of this section.

(Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1337)

49 USCS §10927. Security of motor carriers, brokers, and freight forwarders

(a)(1) The Interstate Commerce Commission may issue a certificate of permit to a motor carrier under section 10922 or 10923 of this title [49 USCS § 10922 or 10923] only if the carrier files with the Commission a bond, insurance policy, or other type of security approved by the Commission. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate of permit, of for loss or damage to property (except property referred to in paragraph (3) of this subsection, or both. A certificate or permit remains in effect only as long

as the carrier satisfies the requirements of this paragraph.

49 USCS §11107. Leased motor vehicles

(a) Except as provided in section 11101(c) of this title [49 USCS §11101(c)], the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 11521 et seq.], that uses motor vehicles not owned by it to transport property under an arrangement with another party to-

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier'

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and

obtain liability and a cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with applicable law as if the motor vehicles were owned by the motor carrier.

(b) The Commission shall require, by regulations, that any arrangement, between a motor carrier or property providing transportation subject to the jurisdiction of the Commission under subchapter II of the chapter 105 of this title [49 USCS §§ 11521 et seq.], and any other person, under which such other person is to provide any portion of such transportation by a motor vehicle not

owned by the carrier shall specify, in writing, who is responsible for loading and unloading the property onto and from the motor vehicle.

(As amended July 1, 1980, P.L. 96-296, § 15(d), 94 Stat. 809.)

49 CFR § 1043.6 Bonds and certificates of insurance.

(a) Public liability. Each Form BMC 82 surety bond filed with the Commission must be for the full limits of liability required under § 1043.2(b)(1). Form MCS-82 surety bonds and other forms of similar import prescribed by the Department of Transportation, may be aggregated to comply with the minimum security limits required under § 1043.2(b)(1) or §1043.2(b)(2). Each Form BMC 91 certificate of insurance filed with the Commission will always represent the full security minimum limits required for the particular carrier, which it remains in force, under § 1043.2(b)(1) or § 1043.2(b)(2), whichever is applicable. Any previously executed form BMC 91 filed before the current revision which is left on file with the Commission after the

effective date of this regulation, and not canceled within 30 days of that date will be deemed to certify the same coverage limits as would the filing of a revised Form BMC 991. Each Form BMC 91X certificate of insurance filed with the Commission will represent the full security limits under § 1043.2(b)(1) or § 1043.2(b)(2) or the specific security limits of coverage as indicated on the face of the form. If the filing reflects aggregation, the certificate must show clearly whether the insurance is primary or, if excess coverage, the amount of underlying coverage as well as amount of the maximum limits of coverage.* Each Form BMC 91MX certificate of insurance filed with the Commission will represent the security limits of coverage as indicated on the face of the form. The Form BMC 91MX must show clearly whether

the insurance is primary or, if excess coverage, the amount of underlying coverage as well as amount of the maximum limits of coverage.

49 CFR Subpart B-Leasing Regulations

§ 1057.11 General Leasing requirements.

Other than through the interchange of equipment as set forth in §1057.31, and under the exemptions set for the in the Subpart c of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) Lease-There shall be a written lease granting the use of the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(b) Receipts for equipment-Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it

shall given the owner of the equipment a receipt. The receipt identified in this section may be transmitted by mail, telegraphy, or other similar means of communication.

(2) When possession of the equipment by the authorized carrier ends, it shall obtain a receipt from the owner.

(3) Authorized representatives of the carrier and the owner may take possession of leased equipment and give and receive the receipts required under this subsection.

(c) Identification of equipment-The authorized carrier acquiring the use of the equipment under this section shall identify the equipment as being in its service as follows:

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the Commission's

requirements in Part 1058 of this chapter (Identification of Vehicles). Upon termination of the lease, the authorized carrier shall remove all identification showing in as the operating carrier before giving up possession of the equipment.

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease operated by it. The statement shall also specify the name of the owner, the date and the of lease, any restrictions in the lease relative to the commodities to transported, the address at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative.

(d) Records of equipment-The authorized

carrier using equipment leased under this section shall keep records of he equipment as follows:

(1) The authorized carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. These documents shall contain the name and address of the owner of the equipment, the point or origin, the time and date of departure, and the point of final destination. Also, the authorized carrier shall carry papers with the leased equipment during its operation containing this information and identifying the lading and clearly indicating that the transportation is under its responsibility. These papers shall be preserved by the authorized carrier as part of its transportation records. Leases which contain the information required by the provisions in

this paragraph may be used and retained instead of such documents or papers. As to lease agreements negotiated under a master lease, this provision is complied with by having a copy of a master lease in the unit of equipment in question and where the balance of documentation called for by this paragraph is included in the freight documents prepared for the specific movement.

(2)[Reserved]

[44 FR 4681, Jan. 23, 1979, as amended at 49 FR 47259, Dec. 3 1984; 49 FR 4785, Dec. 7, 1984; 50 FR 24549, June 12, 1985]

49 CFR § 1057.12 Written lease requirements.

Except as provided in the exemptions set forth in Subpart C of this part, the written lease required under § 1057.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(a) Parties-The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) Duration to be specific-The lease shall specify the time and date of the circumstances on which the lease begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by § 1057.11(b).

(c) Exclusive possession and responsibilities-(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessees shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the equipment for the purposes of subleasing it under these regulations to other authorized carriers during the lease.

(3) When an authorized carrier of household goods leases equipment for the transportation of household goods, as defined by the Commission, the parties may provide in the lease that the

provisions required by paragraph (c)(1) of this section apply only during the time the equipment is operated by or for the authorized carrier lessee.

(d) Compensation to be specified-The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative or the lessor may accept these documents. the amount to be paid may be expressed as a percentage of gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed

upon by the parties to the lease. the compensation stated on the lease orig the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

(e) Items specified in lease. The lease shall clearly specify the responsibility of each party with respect to the costs of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and unused portions of such items. The lease shall clearly specify who is responsible for loading and unloading the property onto and from the motor vehicle, and the compensation, if any, to be paid for this service. Except when the violation results from the acts or omissions of the lessor, the authorized carrier lessee shall assume the risk and costs of fines

for overweight and oversize trailers when the trailers are reloaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside of the lessor's control, and for improperly permitted over dimension and overweight loads and shall reimburse the lessor for any fines paid by the lessor. If the authorized carrier is authorized to receive a refund or a credit for base plates purchased by the lessor from, and issued in the name of, the authorized carrier to another lessor the authorized carrier shall refund to the initial lessor on whose behalf the base plate was first obtained a prorated share of the amount received.

(f) Payment period. The lease shall specify that payment to the lessor shall be made within 15 days after submission of the necessary delivery documents and

other paperwork concerning a trip in the service of the authorized carrier. the paperwork required before the lessor can received payment is limited to log books required by the Department of Transportation and those documents necessary for the authorized carrier to secure payment form the shipper. The authorized carrier may require the submission of additional documents by the lessor but not as a prerequisite to payment. Payment to the lessor shall not be made contingent upon submission of a bill of lading to which no exceptions have been taken. The authorized carrier shall not set time limits for the submission by the lessor of required delivery documents and other paperwork.

(g) Copies of freight bill-Subject to the right of the authorized carrier to delete the names of shippers and

consignees shown on the freight bill, the lease shall specify that the authorized carrier shall give a copy of the rated freight bill before or at the time of settlement to those lessors whose revenue is based on a percentage of the gross revenue for a shipment. The lease shall clearly specify the right of the lessor, regardless of method of compensation, to examine copies of the carrier's tariff.

(h) Charge-back items. The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

(i) Products, equipment, or services from authorized carrier-The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation form purchase or rental payments.

(j) Insurance-(1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to Commission regulations under 49 U.S.C. 10927. The lease shall further specify who is

responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

(2) If the lessor purchases any insurance coverage for the operation of the leased equipment from or through the authorized carrier, the lease shall specify the lessor with a copy of each policy upon the request of the lessor. Also, where the lessor purchases such insurance in the manner, the lease shall specify that the authorized cagier will provide the lessor with a certificate of insurance for each such policy. Each certificate of insurance shall include the name and of the insurer the policy

number, the effective dates of the policy, the amounts and types of coverage, the cost to the lessor for each type of coverage, and the deductible amount for each type of coverage for which the lessor may be liable.

(3) The lease shall clearly specify the conditions under which deductions for cargo or property damage may ge made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of many owed to the lessor. the written explanation and itemization must be delivered to the lessor before any deductions are made.

(k) Escrow funds-If escrow funds are required, the lease hall specify:

(1) The amount of any escrow fund or performance bond required to e paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform the accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly

basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in he lease, and shall provide a final accounting to the lessor or all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

(1) Copies of the lease--An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in §1057.11(c)(2) is carried on the

equipment shall keep the other copy of the lease.

(m) This paragraph applies to owners who are not agents but whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of that authorized carrier. In this situation, the authorized carrier is obligated to ensure that these owners receive all the rights and benefits due an owner under the leasing regulations, especially those set forth in paragraphs (d)-(k) of this section. This is true regardless of whether the lease for the equipment is directly between the authorized carrier and its agent rather than directly between the authorized carrier and each of these owners. The lease between an authorized carrier and its agent shall specify this obligation. (49 U.S.C. 10321, and 11107; 5 U.S.C.

553)

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